2009

Tooele Associates Limited Partnership v. Tooele City : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

TOOELE ASSOCIATES LIMITED PARTNERSHIP, Plaintiff and Appellant, vs. TOOELE CITY, Defendant and Appellee.	:	Appellate No. 20090694-CA

REPLY BRIEF OF APPELLANT

Appeal from the March 16, 2009 Memorandum Decision and Order
Based upon the June 25, 2009 Rule 54(b) Certification
Both Entered in the Third Judicial District Court of Salt Lake County, State of Utah
The Honorable Randall N. Skanchy, District Court Judge

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INTRODUCTION

Tooele Associates' claims for breach of contract and the covenant of good faith and fair dealing are based upon the City's failure to meet its obligations under the specific terms of the Development Agreement to construct and provide storage ponds to "receive," "hold," "store" and "circulate" treated wastewater. Many of the storage ponds never received, held, stored or circulated water under any standard. Instead of responding to that indisputable fact, the City attempts to introduce and present a number of irrelevant topics to divert attention from that essentially primary issue on appeal.

There is no dispute that the storage ponds leak massive amounts of water even though they were designed and constructed properly. The storage lakes leak because, contrary to the instructions the designer issued, the City failed to keep them wet before they were placed in use, similar to allowing a clay pot to bake in the hot summer sun; the linings cracked. The City's "straw man" type arguments do little to advance resolution of this case. *See* Point VI, below. The issue is not why they leak, but rather, in the first instance, whether the City ever provided storage ponds to "receive," "hold," "store" and "circulate" treated wastewater as it was contractually obligated to do.

The seepage standard for the storage ponds never changed, but the party responsible for constructing them did change. At the time the parties entered into the Land Application Agreement (the first of a series of contracts between the parties), Tooele Associates was to construct and own the storage ponds. If that obligation had not been transferred to the City in the Development Agreement, it is difficult to imagine that the City would be satisfied with storage ponds that leak nearly 500,000,000 gallons per year in excess of the 1/4 inch per day allowable leakage requirement. It certainly would not be difficult to envision the City embracing

Tooele Associate's arguments presented in this appeal. It has done so in the past. For example, the City required the contractor that actually built the ponds, Ames, to rework storage ponds 5 and 6 to meet permeability standards in September of 1999. (R. 15030 and 15416).

ARGUMENT[1]

POINT I

THE STANDARD ON REVIEW IS BASED UPON THE TRIAL COURT's GRANTING OF A MOTION FOR SUMMARY JUDGMENT

The issue this appeal presents is whether Tooele Associates had a triable claim for breach of the Development Agreement and/or covenant of good faith and fair dealing related to the storage ponds. There was no evidentiary hearing on this issue and no equitable determinations were made by the trial court.

"We examine a trial court's grant of summary judgment for correctness, according no deference to the trial court's legal conclusions. **This is true whether the issue presented on summary judgment is one of law or equity.**" *Richards v Security Pac. Nat. Bank*, 849 P.2d 606, 608 (Utah Ct. App. 1993) (emphasis added) (citations omitted). "[W]e determine only whether the [district] court erred in applying the governing law and whether the [district] court correctly held that there were no disputed issues of material fact." *Kouris v Utah Highway Patrol*, 2003 UT 19, ¶ 5, 70 P.3d 72.

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[1] Tooele Associates does not respond in this Reply Brief to the City's continuing argument that the trial court's Rule 54(b) certification should be set aside. Brief of Appellee, Tooele City ("Brief of Appellee") at 47-48. Tooele Associates incorporates by reference its Memorandum In Opposition to Tooele City's Motion to Dismiss Appeals for Lack of Jurisdiction and Suggestion of Mootness and this Court's Order dated October 22, 2009.

While it may be appropriate for the City to make new legal argument on appeal, its current argument that the Development Agreement's storage pond provisions are too indefinite to support a specific performance claim was not presented to the trial court. Brief of Appellee, at 38-39. The Development Agreement's storage pond requirements are specific enough to support a specific performance claim.

POINT II

THE DEVELOPMENT AGREEMENT IMPOSES A SPECIFIC LEAKAGE STANDARD BY REQUIRING THE CITY TO COMPLY WITH STATE LAW

A. The Development Agreement Establishes a Leakage Standard

The seepage standard for the storage ponds never changed. It remained static. The Development Agreement altered the party responsible for constructing the storage ponds: the Development Agreement shifted the obligation from Tooele Associates to the City.

Early in their relationship, the parties entered into the Land Application Agreement (R. R. 14545-53) (attached as Addendum No. 1), in which they very specifically agreed upon the standards that would apply to their respective secondary water facility obligations, including the storage ponds. Consequently, the Land Application Agreement, which Section XIV of the Development Agreement specifically states "shall remain in effect," provides the method by which the seepage standard applicable to the storage ponds is to be determined. Under the Land Application Agreement, the City has a contractual obligation to Tooele Associates to comply with all applicable State law in its management of the treated wastewater and associated facilities prior to discharging that water to Tooele Associates at the point the water leaves City property. (R. 14546 ¶ 1-1 & 14549 ¶ 4-1). Tooele Associates has a similar obligation in its use of treated wastewater past the point of discharge. (*Id.* at ¶ 1-5).

The Development Agreement did not change this contractual obligation of the parties to comply with State law. Rather, it changed the point of discharge[2] and made City the owner of the ponds and the water in them. Accordingly, under the Development Agreement and the incorporated Land Application Agreement, the City has a contractual duty to comply with State law in relation to the storage ponds.

Tooele Associates uses the treated wastewater to irrigate the golf course by pumping it out of the storage ponds through pumps owned by Tooele Associates and located near ponds 4 and 17. (R. 15023). Accordingly, the water is discharged to Tooele Associates, leaving the City's property, when it passes through those pumps.[3] It is at that point that the water leaves the City's property and comes into Tooele Associates' possession.

State law, via Utah Administrative Code R317-3-13E, requires that the ponds meet a seepage standard of $1x10^{-6}$ cm/sec or 1/4" per day of total seepage.[4] (R. 18827, 18801-2, 15029 and 15458-460). The State specifically applied this standard to the ponds, and noted compliance

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[2] The Development Agreement transferred ownership of the ponds and the associated transfer facilities to the City, specifically providing that Tooele Associates would not own them. (R. 14510 §V.2.E). This facilitated the City's desire to obtain federal funding for the ponds. (R. 15029).

[3] The treated wastewater is pumped from the treatment plant directly into one of three ponds, and then flows by gravity between the ponds through transfer structures. (R. 15415 and 15027). When the City talks about the wastewater leaving its property after it leaves the boundary of the fence around the treatment plant, it is turning back the clock of history to before the Development Agreement. That was true only before the Development Agreement was signed.

[4] The Development Agreement specifically calls the storage ponds "lagoons." (R. 14510 § VII.2.D). In any event, the State of Utah required that the storage ponds comply with the seepage requirements set forth in the Utah Administrative Code regardless of whether the storage ponds are "lagoons" or not "lagoons." The State specifically subjected the storage ponds to the 1×10^{-6} cm/sec seepage standard. (R. 18827). Its applied this requirement to the ponds, without regard to whether they were "lagoons" or not.

with the standard was a pre-requisite for approval of their construction. (R. 18827-28). City engineer Gerald Webster admitted that the City is not only bound by that standard in relation to the storage ponds, but that it adopted an even stricter standard. (R. 18831). The stricter standard was 1/8" per day. (R. 15029). The ponds, however, leak nearly 500 million gallons per year more than allowed even under the more lenient State law standard. (R. 15499-500). One assumes a finder of fact could reasonably conclude that leakage of almost one-half billion gallons per year is a breach in the City's performance of its Development Agreement obligation to provide storage ponds.

Accordingly, the Development Agreement's storage pond requirements are not indefinite. The City required the contractor, Ames, to rework ponds 5 and 6 to meet permeability in September 1999. (R. 15030 and 15416). This is not a case "where there was simply some nebulous notion in the air that a contract might be entered into in the future . . . ." *Prince, Yeates & Geldzahler v Young*, 2004 UT 26, ¶ 14, 94 P.3d 179 (quoting *Valcarce v Bitters*, 362 P.2d 427, 428-29 (Utah 1961)). The parties agreed that the City would own the ponds, that they would not be maintained by Tooele Associates, that the City would comply with State law in relation to the ponds and that the purpose of the ponds was to store water for beneficial use in irrigating both the golf course and other areas of Overlake. State law requires that the ponds meet a seepage standard of 1/4" per day.

The City's ownership of the ponds is not an issue. As the City repeatedly emphasizes, "[a]n admission of fact in a pleading is normally conclusive on the party making it." *Baldwin v Vantage Corp.*, 676 P.2d 413, 415 (Utah 1984). In its Counterclaims, the City admitted, "[s]ince 1999, the City has had ownership and lawful possession of the storage lakes." (R. 806 ¶ 155, R.

13550 ¶ 140) (emphasis added).[5] In fact the City sued Tooele Associates for trespassing upon and interfering with "its" ponds, including the City's ability to "maintain its storage lakes". (R 13550-53).

B. The City's Own Conduct Independently Establishes A Leakage Standard

Even if State law did not establish a specific seepage standard, Tooele Associates' storage pond claims remain viable. "If the parties have concluded a transaction in which it appears that they intend to make a contract, the court should not frustrate their intention if it is possible to reach a fair and just result, even though this requires a choice among conflicting meanings and the filling of some gaps that the parties have left." *Evans v Board of County Com'rs*, 2005 UT 74, ¶ 16, 123 P.3d 432 (quoting Corbin on Contracts, § 4.1 (rev. ed.1993)). Further, "the intentions of the parties to a contract are controlling, and generally those intentions will be found in the instrument itself. However, if a writing is not sufficient to establish meaning, resort may be had to extraneous evidence manifesting the intentions of the parties." *John Call Eng'g, Inc. v Manti City Corp.*, 743 P.2d 1205, 1207 (Utah 1987).

There is evidence in the record, which establishes at the very least a dispute of material fact, concerning the intentions of the parties regarding how much water the storage ponds should hold. First, the Development Agreement itself notes that the purpose of the ponds is to store water so that it could be beneficially utilized for irrigation. (R. 14514 § VII.2.D). Tooele Associates was obligated by the Development Agreement to install a secondary water system designed to transport treated wastewater from the ponds to developed portions of Overlake for

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[5] Construction of the storage ponds began in the spring of 1998 and finished in approximately April of 1999, with ponds 5 and 6 being reworked to meet permeability in September of 1999. (R. 15030 and 15416). The treatment plant went online in April of 2000 and water began flowing to the ponds in May 2000. (R. 15031). Thus, this is an admission that the City always has owned the ponds following their construction and during their usage.

outdoor irrigation. (R. 14508-09 § V.2.A & V.2.B). Tooele Associates did install that system in the few small residential subdivisions in Overlake the City actually allowed it to develop, to the tune of $1,229,777.00. (R. 8337 ¶ 3). The City later bought this system for $1,093,719.00. (*Id.*) Surely the parties did not spend these sums on a system without intending that it would be supported by functioning storage ponds.

Further, City Engineer Gerald Webster admitted the City was bound by state seepage standard, but adopted a higher standard. (R. 18831). The construction plans required adherence to these seepage standards. (R. 16055). These actions and large expenditures indicate that the parties intended that the ponds would store enough water to support irrigation of not just the golf course, but other developed areas of Overlake. By failing to meet the 1/4" per day seepage standard, the ponds in large measure fail to accomplish the purpose for which they were built. They leak so much they could not support irrigation of anything but the golf course. (R. 15499).

This evidence is enough to create issues of material fact concerning how much water the ponds must store and whether that standard has been met. This evidence supports not only Tooele Associates' damage claim, but also is sufficient to allow a claim for specific performance. "There is no principle in equity that demands all the terms of the contract must be set forth in the written agreement. Rather, although an agreement is uncertain or incomplete in some respects, its specific enforcement may nevertheless be decreed where the uncertainty relates to matters which the law makes certain or complete by presumption, rule or custom, or usage . . . ." *Brown's Shoe Fit Co. v. Olds*, 955 P.2d 357, 363 (Utah Ct. App. 1998) (citation omitted).

If the Development Agreement does not define a seepage standard, the parties subsequent actions and admissions in fulfilling their contractual obligations set that standard. A finder of fact should be allowed to determine whether the storage ponds receive, hold, store

and circulate treated wastewater in the manner agreed to and intended by the parties. "Only when contract terms are complete, clear, and unambiguous can they be interpreted by the judge on a motion for summary judgment. If the evidence as to the terms of an agreement is in conflict, the intent of the parties as to the terms of the agreement is to be determined by the jury." *Colonial Leasing Co. of New England v Larsen Bros. Constr. Co.*, 731 P.2d 483, 488 (Utah 1986) (citations omitted).

POINT III

TOOELE ASSOCIATES MADE AND PRESERVED A CLAIM FOR DAMAGES RESULTING FROM THE CITY's STORAGE POND BREACHES

The City's attempt to narrowly redefine Tooele Associates' storage pond claims as seeking solely specific performance ignores Tooele Associates' consistent requests for damages, even if only nominal damages, on these claims. At the very least, there are disputed issues of material fact relating to Tooele Associates' storage pond damage and relief claims which precluded summary judgment.

The City's breaches of its storage pond obligations damaged Tooele Associates by negatively impacting the value and ambiance of the real property neighboring the golf course, damaging the increased marketability of what would ordinarily be upscale golf course lots. (R. 15004, 15772-75). Additionally, the faulty ponds cannot store enough water for irrigation of areas other than the golf course, as set forth in the Development Agreement's re-use provisions. (R. 15499). Quantifying these damages is difficult, particularly in light of the trial court's ruling dismissing the claims of Tooele Associates' development partners, including the owners of the golf course and the real property surrounding the golf course. Despite that difficulty, Tooele Associates is entitled to the benefit of its bargain and, at the least, to either

nominal damages or equitable relief. "[I]t is well settled that [n]ominal damages are recoverable upon a breach of contract if no actual or substantial damages resulted from the breach or if the amount of damages has not been proven." *Bair v Axiom Design, LLC*, 2001 UT 20, ¶ 18, 20 P.3d 388 (quotation omitted). Further, "specific performance is a remedy which is normally only granted when damages may not accurately be ascertained or would not adequately compensate the plaintiff." *Delivery Service & Trans. Co. v Heiner Equip. & Supply Co.*, 635 P.2d 21, 21 (Utah 1981); *see also* Restatement (Second) Contracts § 357 (1981). Further, Tooele Associates may be entitled to its attorney fees and costs on these issues pursuant to Amendment No. 4.

As noted by Rule 8(a) of the Utah Rules of Civil Procedure, Tooele Associates is entitled to demand on a claim "[r]elief in the alternative or of several different types . . . ." In its Second Amended Complaint, Tooele Associates prayed for damages and/or specific performance as alternative forms of relief for the City's breach of contract and of the covenant of good faith and fair dealing in relation to the storage ponds. (R. 13449, 13453-54 and 13470-71). Although specific performance is Tooele Associates' preferred form of relief, it made and preserved a claim for damages. By the time Tooele Associates opposed the City's Motion for Partial Summary Judgment on the storage pond claims; the difficulties associated with calculating damages were apparent. Nonetheless, Tooele Associates preserved its claims for, at the least, for nominal damages. (R. 15004). This claim again was noted in Tooele Associates' Brief. *See* Brief of Appellant at 41 n. 11. Proving a claim for even nominal damages in this case could be very important. Both parties have asserted the doctrine of prior material breach to suggest that they were excused from performing the Development Agreement following the other side's

breach. The City's failure to provide storage ponds that actually store water likely was the "first" material breach of the Development Agreement.

POINT IV

THE ELECTION OF REMEDIES DOCTRINE DOES NOT IMPEDE TOOELE ASSOCIATES' STORAGE POND CLAIMS

The City's election of remedies argument is based upon at least two faulty premises: first, it suggests that Tooele Associates has made a binding election of remedy in this case; second, it assumes that Tooele Associates' claim for equitable relief on its storage pond claims and its claims for damages stemming from other breaches of the Development Agreement are inconsistent thus implicating the election of remedies doctrine.

A. There Has Been No Binding Election of Remedy

In its Order on Pre-Trial Motions Based Upon Rulings Made During May 1, 2009, Pre-Trial Hearing, the trial court noted:

> The court initially granted the City's Motion to Compel Plaintiffs to Elect Their Remedy, requiring an election by May 15, 2009. The Court subsequently received pleadings and argument on Motion for Reconsideration, and after doing so, rescinded its Order that the parties elect their remedy prior to trial. Election of remedy issues shall be determined after trial and prior to entry of Judgment.

(R. 20832-33) (emphasis added).[6]

Accordingly, following trial and verdict, and prior to the entry of judgment, Tooele Associates filed its October 30, 2009 election of remedy. (R. 22928-29). That election of remedy specifically was based upon the findings in the jury's verdict, including the damage findings. At

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[6] The City has not argued in this appeal that the trial court's Order as to the timing of an election of remedy was in error. This is the law of the case.

that time, the parties had competing motions for entry of judgment pending before the court. Subsequently, the trial court determined that, due to what it believed were inconsistencies in the jury's verdict, it would not enter judgment. Instead, the court declared a mistrial and ordered a new trial as to all claims. (6/3/10 Memo. Dec. And Order on Mots. For Entry of J., Exhibit A to City's Brief). Accordingly, in effect, there has been no trial and no verdict in the case.[7] Further, there has been no trial at all on the storage pond claims which were dismissed on summary judgment. Tooele Associates October 30, 2009 election of remedy is effectively moot, and Tooele Associates has not yet crossed the threshold at which it must make a binding election of remedy.

B. Assuming There Has Been an Election, A Request for Equitable Relief on the Storage Pond Claims Remains Viable

"The doctrine of election of remedies is a technical rule of procedure and its purpose is not to prevent recourse to any remedy, but to prevent double redress for a single wrong." *Royal Res., Inc. v Gibralter Fin. Corp.*, 603 P.2d 793, 796 (Utah 1979) (emphasis added). Accordingly, "[s]aid doctrine presupposes a Choice between inconsistent remedies, a knowledgeable selection of one thereof, free of fraud or imposition, and a resort to the chosen remedy evincing a purpose to forego all others." *Id.* (emphasis added). Accordingly, in order to be subjected to the doctrine, Tooele Associates' request for equitable relief on the storage pond claims and damages on its other breach of Development Agreement claims must "arise from a single wrong" and must be inconsistent, potentially leading to a double recovery.

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[7] Tooele Associates has from appealed the trial court's June 3, 2010 declaration of a mistrial and is seeking to have the jury's verdict restored and judgment entered upon it. That appeal also currently is pending before this Court. (Appellate Case No. 20100504-CA).

The City's breach of the storage pond provisions and its breaches of other Development Agreement provisions are not "a single wrong." Tooele Associates' non-storage pond breach claims primarily are concerned with the City's inspection of public improvements, failure to accept public improvements, and refusal to approve continuing development of Overlake. (R. 22162-64). Those breaches are factually distinct from the storage pond breaches, arising from completely different actions by the City. This also is why the trial court correctly found that its summary judgment dismissal of the storage pond claims was appropriate for certification as a final judgment under Rule 54(b).

Moreover, Tooele Associates' request for equitable relief as the remedy for the City's breach of its storage pond obligations and its separate request for damages as the remedy for the City's breaches of other provisions of the Development Agreement are not inconsistent, nor could they lead to a double recovery. The City is seeking to improperly utilize the election of remedies doctrine to deny Tooele Associates the possibility of any remedy at all on the storage pond claims.

Damages and specific performance may be consistent remedies, as they are in this case. "Election doctrines generally forbid the claim of different remedies when one of the remedies claimed 'affirms' the transaction and the other 'disaffirms' it. Damages and specific performance are affirming remedies because they contemplate that the deal will go through. . . ." 3 Dan B. Dobbs, Dobbs Law of Remedies § 12.8(1), 194 (2d ed. 1993) (emphasis added). Thus, "[s]pecific performance may be combined with damages in appropriate cases; the fact that specific performance is or must be denied as to some part of the contract does not prevent specific performance as to the remainder." *Id.* at 193. The reason for this is very simple – by definition, specific performance is a remedy typically awarded only where there is no adequate

remedy at law, and therefore, the plaintiff is at risk of suffering irreparable harm. *See id.* at 190 & *Thurston v. Box Elder County*, 892 P.2d 1034, 1040 (Utah 1995) ("[E]quitable relief should be granted only when a court determines that damages are inadequate and that equitable relief will result in more perfect and complete justice.").

The City's non-storage pond breaches of the Development Agreement support calculable damages; at this time, its breaches of the storage pond provisions do not. This does not mean that recovery of the calculable damages precludes any remedy for the breach of those contractual provisions for which damages may not be adequately determined.

Tooele Associates' damage claim in the June 2009 trial had nothing to do with the storage pond claims, which already had been dismissed. Not only had the storage pond claims been dismissed, the parties specifically were precluded from introducing any evidence related to those claims. (R. 20836 ¶ 12). This ensured that the damages awarded by the jury had nothing to do with the storage pond claims.

Accordingly, Tooele Associates did not "cash out" the City's storage pond obligations. *See* Brief of Appellee at 45. Assuming that Tooele Associates has elected damages on its non-storage pond breach claims, an award of equitable relief on the storage pond claims would not be cumulative or result in any kind of a double recovery.[8] An election of a viable legal remedy only would preclude equitable relief on those claims from which the viable legal remedy arose:

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[8] Of course, even if the City is correct in arguing that an award of damages on the non-storage pond breach claims precludes equitable relief on the storage pond claims, at this point there has been no award of damages to Tooele Associates. No judgment was entered due to the trial court's declaration of a mistrial. There has been no determination that equitable relief on any of Tooele Associates' claims is inappropriate due to the existence of a viable legal remedy. This remains the case absent the restoration of the jury's verdict or a new award of damages in a new trial, together with the entry of a judgment.

> (2) If specific performance or an injunction is denied as to part of the performance that is due, it may nevertheless be granted as to the remainder.
>
> (3) In addition to specific performance or an injunction, damages and other relief may be awarded in the same proceeding and an indemnity against future harm may be required.

Restatement (Second) Contracts § 358.

In this case, the remedies Tooele Associates seeks are consistent – both damages and specific performance affirm the underlying Development Agreement between the parties. There would be no double recovery if Tooele Associates were awarded equitable relief on the storage pond claims and damages on its other breach of Development Agreement claims. Tooele Associates has the right to seek a combination of damages and specific performance to make it whole following the City's breaches.

C. Assuming There Has Been an Election, A Claim for Damages on the Storage Pond Claims Remains Viable

As set forth in Point III, above, Tooele Associates made and preserved a claim for damages as the remedy for its storage pond claims. That remedy could not be precluded by Tooele Associates' election of damages as the remedy for the other breach claims. As previously mentioned, Tooele Associates' damage claim, and the June 2009 jury verdict, did not incorporate any claimed damages resulting from the storage pond claims. The storage pond claims had been dismissed and any related evidence was excluded. Accordingly, if the storage pond claims are restored, Tooele Associates may seek to recover damages resulting from the City's breach of its storage pond obligations, even if those damages are nominal.

POINT V

IF TOOELE ASSOCIATES RETAINED THE OBLIGATION TO BUILD THE STORAGE PONDS, CERTAINLY THE CITY WOULD NOT ACCEPT STORAGE PONDS THAT LEAK NEARLY 500,000,000 GALLONS OF WATER PER YEAR

In the Annexation Agreement (Exhibit M to the Development Agreement; R.14541 – attached as Addendum No. 2) dated November 15, 1995, Tooele Associates was to build a golf course utilizing the storage ponds as water hazards. Consequently, at the time the parties entered into the Land Application Agreement on June 5, 1997 (Exhibit N to the Development Agreement; R. 14545), Tooele Associates was to construct and own the storage ponds. The Land Application Agreement obligated Tooele Associates to maintain the storage ponds:

> 1-8 ASSOCIATES shall promptly, without cost to the CITY, make necessary repairs and maintenance to the distribution system wastewater treatment facility or discharge equipment **beyond the point of discharge**, to correct deficiencies noted by federal or state regulatory agencies.

(R. 14547) (emphasis added).

If that obligation had not been transferred to the City in the Development Agreement, it is difficult to imagine that the City would be satisfied with storage ponds that leak nearly 500,000,000 gallons of water per year in excess of the 1/4 inch per day allowable leakage requirement. After all, the City is the litigant that claimed that the golf course being closed on certain winter days was a material breach of the Development Agreement. The City is the litigant that sued Tooele Associates for allegedly not properly constructing and maintaining the secondary water system – a system that the City has never used, which it says it does not have to use and that it cannot use given the condition of the storage ponds. (R. 13548).

POINT VI

THE CITY MAKES REPEATED ATTEMPTS TO DIVERT THIS COURT'S ATTENTION AWAY FROM THE REAL ISSUES IN THIS CASE

Tooele Associates' claims for breach of contract and the covenant of good faith and fair dealing are based upon the City's failure to meet its obligations under the specific terms of the Development Agreement which require the City to construct and provide storage ponds to "receive," "hold," "store" and "circulate" treated wastewater under a specific seepage standard. Many of the storage ponds never received, held, stored or circulated water under any standard. The City attempts to introduce and present a number of irrelevant topics to divert attention from this real issue.

A. Red Herring No. 1: Amendment No. 4 Did Not Release the City From Its Storage Pond Obligations Under the Development Agreement Nor Did It Otherwise Supercede Those Obligations

Amendment No. 4 does not release the City from its storage pond duties pursuant to the Development Agreement. The release provision of Amendment No. 4 is clear and unambiguous and has no effect upon the City's obligation to construct and provide storage ponds that receive and hold treated wastewater:

> 11. Mutual Release. The parties . . . hereby forever release and discharge each other from any and all claims . . . arising out of Associates' agreement to reimburse the City for the costs of designing, constructing, and equipping the storage ponds under Paragraph VII(2)(D) of the Development Agreement. By virtue of this provision, the Parties acknowledges (sic) that Associates will have no further obligation to reimburse the City for the costs of the storage ponds."

Amendment No. 4 at 4 (R. 8338) (emphasis added).

The scope of the release is limited to all claims arising out of "Associates' agreement to reimburse the City for the costs of designing, constructing, and equipping the storage ponds . . . ." The release does not include all claims arising from the City's failure to construct and provide storage ponds that receive and hold treated wastewater. Rule 8(c) of the Utah Rules of Civil Procedure specifies "release" as a defense which must be affirmatively plead. Even if the release language of Amendment No. 4 could somehow be stretched to apply to the City's storage pond obligations, release is not a defense available to the City. The City did not plead "release" as an affirmative defense in its Answer to Second Amended Complaint. (R. 13515-523). Because the City did not raise release as an affirmative defense, it cannot now utilize Amendment No. 4's release against Tooele Associates' storage pond breach claims. See *Valley Bank & Trust Co. v. Wilken*, 668 P.2d 493, 493-94 (Utah 1983) (holding failure to raise an affirmative defense in the pleadings constitutes waiver). Regarding this release argument by the City, the trial court noted: "Sometimes bad arguments should never be bundled with good arguments, and that's a bad argument for the City." (R. 22694 at pg. 46).

B. Red Herring No. 2: Tooele Associates' Storage Pond Breach Claims Do Not Depend Upon a Defect In Design or Construction

The City's mantra that Tooele Associates never proved a defect in the design or construction of the storage ponds really is a straw man argument. The Development Agreement requires the City "to construct and provide storage ponds and lagoons, . . . to receive and hold treated wastewater from the new wastewater treatment plant . . . ." (R. 14514 § VII.2.D) (emphasis added). The Development Agreement requires "all ponds constructed to store and circulate treated wastewater . . . ." (R. 14500, § V.1.E) (emphasis added). The City's obligation

to construct and provide storage ponds to "receive," "hold," "store" and "circulate" treated wastewater is a performance standard.

Why the ponds never met that performance standard is of no consequence to this appeal. But, as discovery demonstrated, the storage ponds' massive, excess leakage and loss of water is the result of several factors within the City's control. Principal among those factors was the drying, dessication and cracking of the ponds' liners in the period following construction and preceding the commencement of water inflow from the treatment plant because the City allowed the ponds to dry out. (R. 15031-32, 15435). This, of course, is the City's fault, an inference to which Tooele Associates is entitled on summary judgment. This is not a tort case; fault between or among the contractor, designer and the City is not an issue, but instead, is a distraction.

C. Red Herring No. 3: There is No Evidence That Tooele Associates Caused Leakage

The City asserts that Tooele Associates caused and is to blame for the storage ponds' leakage. The City has been liberal with the conclusions it draws from the record. The only evidence concerning the cause of the ponds' leakage are the reports prepared by the City-retained engineers. Those reports indicate that the storage ponds' leakage was caused by drying and dessication of the ponds' liners as they sat dry following construction and prior to the wastewater plant beginning effluent production. (R. 15031-32, 15435, 15454-55. 15788-93. 15796-802, 15469, 15032 and 15435).

The City makes the sweeping argument, "TA has only itself to blame for storage lake conditions that arose between the lakes' completion on January 1, 2000 and at least up until September 2001." (Brief of Appellee at 35). None of the evidence the City cites supports this

sweeping proposition. Even if the City's position was supported by some evidence, this simply would create an issue of material fact, precluding summary judgment.

It never was Tooele Associates' responsibility to maintain the ponds. (R. 14510 § V.2.E, City Engineer Paul Hansen - R. 15835, lines 3-5, "It is the City's responsibility and their sole responsibility to maintain the lake levels." and R. 15836, lines 16-18, "I don't know if there's anything that prohibited [Drew Hall from adjusting lake levels] but it was not his responsibility or his duty to do it."). Tooele Associates was forced to undertake some management of water flow between the ponds due to the City's complete lack of attention. (R. 15788-806). Tooele Associates' efforts to avert a catastrophe does not mean that Tooele Associates was responsible for maintaining the ponds; the Development Agreement specifically absolves Tooele Associates from that responsibility. (R. 14510, § V.2.E). Further, none of the evidence the City cites to support its sweeping statements suggests how Tooele Associates' voluntary efforts to control the flow of effluent between the ponds would have solved the problem that caused the leakage – liner dessication during the time that no effluent was being produced and directed into the ponds.

The City also argues, "[h]ad TA performed the maintenance agreement as promised, any problems arising from the start-up should have been cured." (Brief of Appellee at 35). Once again, the City is being liberal with the conclusions it draws from the record and ignores the standard for review of a summary judgment. The City cites R. 14640-56, 14686-88, 14561-65 and 14569 as support for this proposition. The maintenance work Tooele Associates allegedly was supposed to complete is listed at R. 14640-41. Not a single one of those work items involves keeping the ponds' liners moist following construction, or otherwise preserving the integrity of the liners except, perhaps, for erosion repair. Moreover, Tooele Associates

performed work items listed in this maintenance agreement, including the erosion repair. (R. 14561-65). The City has not cited this Court to a shred of evidence suggesting that the failure to complete any or all of the work items listed in R. 14640-56 caused the storage ponds' massive leakage.

The same is true for the City's allegations that Tooele Associates damaged the ponds by channeling storm water into the ponds, putting pipes into the ponds or digging holes in two ponds. There is no evidence that these actions caused the ponds' massive leakage. Rather, the evidence is that the City's failure to keep the liners moist following construction caused the leakage. (R. 15031-32, 15435).

D. Red Herring No. 4: The "Lack of a Maintenance Agreement"

The City always has acknowledged that it had an obligation to maintain the storage ponds. For example, in Mr. Hall's letter to City Engineer Gerald Webster dated February 14, 2005, Mr. Hall states:

> 1. Tooele City is responsible for the maintenance of the lakes and specifically managing and monitoring lake water levels and flow. The lakes require daily monitoring. You have agreed.

(R. 15828).

In Mr. Webster's response to Mr. Hall dated March 7, 2005, Mr. Webster implicitly acknowledges that obligation. (R. 15831-32). There is other correspondence as well: A September 10, 2001 letter to Gerald Webster from Drew Hall (R. 14640) proposing that the City pay Tooele Associates to perform work on the storage ponds; and a June 16, 2002 letter to G. Webster from D. Hall (R. 14662-63) stating, "Maintenance of the Lakes has always been the responsibility of Tooele City." (emphasis added).

In its own pleadings, the City acknowledged its obligation to maintain the storage ponds: "Under the Development Agreement and by necessity, the City has easements over the Overlake Golf Course to access and maintain its storage lakes." (R. 390 ¶ 165; R. 4552 ¶ 184). The City also has complained in its pleadings that Tooele Associates interfered with its ability to maintain its storage ponds:

> TA's interference with the City's access to the City's storage lakes has, at times, prevented the City from maintaining its secondary water infrastructure, including the storage lakes, water transmission lines, water valves and drains.

(R. 371 ¶ 63; R. 4533 ¶ 68; R. 13537 ¶ 68).

> TA materially breached its contractual obligations under the Development Agreement and Amendment # 4, including by:
>
> d. interfering with easements granted to the City access and maintain the wastewater system, including the storage lakes;

(R. 379 ¶ 105.d.; R. 4542 ¶ 121; R. 13546 ¶ 116).

According to City Engineer Paul Hansen, it was the City's exclusive duty to manage the start-up, operation and maintenance of its storage ponds. (R. 15835, lines 3-5, "It is the City's responsibility and their sole responsibility to maintain the lake levels." and R. 15836, lines 16-18, "I don't know if there's anything that prohibited [Drew Hall from adjusting lake levels] but it was not his responsibility or his duty to do it."). City Councilman John Hansen also admitted to the City's maintenance obligation. (R. 15839).

The City was provided with an Operations and Maintenance Manual for the Tooele City Wastewater Treatment Facility, which contained instructions on the operation and maintenance of the storage ponds. (R. 15854-62, at §12, R. 15484 and R. 15847-48). The City utterly ignored

and neglected its duty to manage the start-up, operation and maintenance of its storage ponds. (R. 15454, R. 15788-93 and 15796-802).

City Engineer Gerald Webster requested that Tooele Associates' monitor and adjust the flow of water between the storage ponds and monitor the ponds overflow grates because he did not want the City to have to do it and because he believed it was more efficient for Tooele Associates to perform the work than it was for the City. (R. 15791-95, 15803-04, 15814, 15820-21 and 15463 at pg. 134.) Accordingly, Tooele Associates and the City attempted to negotiate maintenance agreements through which Tooele Associates would assume the City's obligations to maintain the ponds, but those negotiations never resolved. (*Id.*)

The parties unsuccessful attempt to negotiate a maintenance agreement for the ponds, outside of the Development Agreement, is irrelevant for at least two reasons. First, the maintenance agreement the parties were negotiating was an agreement for Tooele Associates to assume the City's responsibility for maintaining the ponds. The Development Agreement specifically provides Tooele Associates would not own or maintain the ponds. Thus, if the City wanted Tooele Associates to maintain the ponds, a maintenance agreement would have been required. (R. 14510, § V.2.E).

Because those maintenance agreements were never finalized, Tooele Associates did indeed complain about the lack of maintenance agreements. Those complains are not admissions that the City was not already obligated to maintain the ponds. The Development Agreement obligates the City to maintain the ponds, and the City has repeatedly acknowledged this responsibility. Negotiations concerning a subsequent maintenance agreement that did not come to fruition are irrelevant.

The City neglected the management of the storage ponds. This forced Tooele Associates to occasionally adjust the flow of water between the ponds and make sure that the ponds' overflow grates were clean. (R. 15791-95, 15801-02, 15805-06, 15808-09 and 15811-13). Tooele Associates performed these tasks, not because of any duty or responsibility, but to prevent a catastrophe. (*Id.*)

E. Red Herring No. 5: The Storage Pond Overflows

The City argues, "[i]ndeed, the lakes hold so much water that, according to judicial admissions in TA's Second Amended Complaint, they 'overflow[ed] on one or more occasions.'" (City's Brief pg. 33) (citations omitted). This argument makes the inaccurate implication that all the ponds overflowed or that overflow was caused by all of the ponds being filled to capacity. The City continues with this implication: "TA's judicial admissions of storage lake overflows belie TA's assertion that '[t]he storage ponds have never been filled to capacity, or even close to their capacity.'" (*Id.* n. 16) (citations omitted). This is simply inaccurate.

The storage ponds never have been filled to capacity and some of them have never received or held water in any appreciable amount. (R. 18796-797, 18801 and 18810-813). Nothing the City cited, and indeed nothing in the record, refutes these facts. Mr. Hall's testimony concerning isolated incidents of individual ponds overflowing certainly does not suggest that all the ponds have been filled to capacity. Rather, at R. 15788-806, Mr. Hall extensively testified concerning the City's lack of care in managing the flow of water between ponds, which lead to isolated incidents of individual ponds overflowing. He testified that the City's neglect compelled Tooele Associates to step in and manage water flow to prevent overflows of certain ponds. In fact, Mr. Hall's testified that he observed that the water would fill ponds 17, 16, 15, 14, 13, 12 and only half of 11 and then would stop filling, indicating that

leakage and input had equalized. (R. 15801). This is in accord with his affidavit testimony regarding the ponds never being filled to capacity and some ponds never holding any water at all. (R. 18796-97).

CONCLUSION

The City's did not meet its obligations under the specific terms of the Development Agreement to construct and provide storage ponds to "receive," "hold," "store" and "circulate" treated wastewater. Two ponds, Nos. 8 and 9, never have stored treated wastewater. (R. 18796-797, 18801, and 18810-813). Pond No. 8 received wastewater on only one occasion, when the City requested Tooele Associates to fill it up. (R. 18797). Pond No. 9 has never received or stored any treated wastewater. (R. 18797). Pond Nos. 5, 6, 7 and 11 occasionally receive treated wastewater but they never have held or stored such water in any meaningful amount or for any meaningful period of time. (*Id.*) The storage ponds have never been filled to capacity, or even close to their capacity. (R. 18796).

The City's Brief demonstrates the complex factual background behind this dispute, in which there exist multiple disputes of fact which should have precluded the trial court from granting summary judgment. A finder of fact should be allowed to consider the evidence and determine whether the City met its storage pond obligations. Accordingly, summary judgment should be reversed and the case remanded for trial. Alternatively, the trial court's entry of summary judgment should be reversed and the case remanded for entry of judgment in Tooele Associates' favor due to the City's undisputed failure to meet its contractual obligations.

DATED: September 21, 2010.

LARSEN CHRISTENSEN & RICO

Mark A. Larsen
P. Matthew Muir

BRUCE R. BAIRD, PC

Bruce R. Baird

Attorneys for Appellant Tooele Associates, L.P.

CERTIFICATE OF SERVICE

I certify that on September 21, 2010, two copies of the foregoing Reply Brief of Appellant was served upon the following party of record via hand-delivery:

George M. Haley
Chris R. Hogle
Holme Roberts & Owen
299 South Main Street, Suite 1800
Salt Lake City, Utah 84111-2263

Tab 1

OVERLAKE DEVELOPMENT AGREEMENT
EXHIBIT N
LAND APPLICATION AGREEMENT/FUNDING AGREEMENT

DDK 12-18-97

LAND APPLICATION AGREEMENT/
FUNDING AGREEMENT

THIS AGREEMENT is made and entered into this 1st day of June, 1996, by and between the City of Tooele, Utah, a municipal corporation, hereinafter referred to as the CITY, and Tooele Associates LLC, a Washington Limited Liability Corporation, hereinafter referred to as ASSOCIATES.

WHEREAS, the CITY has previously agreed to construct a wastewater treatment facility on property formally owned by ASSOCIATES; and

WHEREAS, ASSOCIATES has previously agreed to purchase and store wastewater effluent discharged from the CITY'S new wastewater treatment facility;

NOW THEREFORE, in consideration of the mutual covenants set forth herein, the parties agree as follows

ARTICLE I

COMPLIANCE WITH FEDERAL AND STATE WATER REGULATIONS

1-1 The CITY shall comply with all applicable Federal and State of Utah Division Of Water Quality laws and regulations related to operation and maintenance of the wastewater treatment facility and discharge of wastewater effluent to ASSOCIATES

1-2 The CITY shall make available to ASSOCIATES all written documentation related to compliance with federal and state water quality laws.

1-3 The CITY will provide written notification to ASSOCIATES within 48 hours of any communication from federal or state agencies alleging non-compliance with existing regulations.

1-4 The CITY shall promptly, without cost to ASSOCIATES, make necessary repairs and maintenance to the wastewater treatment facility or discharge equipment to correct any deficiencies noted by federal or state regulatory agencies.

1-5 Beyond the point of discharge, ASSOCIATES shall comply with all applicable Federal and State of Utah Division Of Water Quality laws and regulations related to the use of treated wastewater.

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1-6 ASSOCIATES shall provide the CITY with all written documentation related to compliance from federal and state agencies, including the State of Utah Division Of Water Quality, that have regulatory jurisdiction over the ASSOCIATES use of treated wastewater effluent, within 30 days of receipt by the ASSOCIATES.

1-7 ASSOCIATES will provide written notification to the CITY within 48 hours of any communication from federal or state agencies alleging non-compliance on the part of ASSOCIATES

1-8 ASSOCIATES shall promptly, without cost to the CITY, make necessary repairs and maintenance to the distribution system wastewater treatment facility or discharge equipment beyond the point of discharge, to correct deficiencies noted by federal or state regulatory agencies

ARTICLE II

TERM

2-1 The term of this lease shall be twenty (20) years with four options to renew subject to the terms herein.

2-2 The commencement date shall be the 1st day of January 1998, or at such time as the City begins discharge of treated wastewater, whichever occurs later in time

2-3 Termination of the initial term shall occur on the 1st day of January 2018, unless sooner terminated as provided herein.

2-4 ASSOCIATES shall provide written notice to the CITY of its intention to exercise its option to renew twelve (12) months prior to the expiration of the then current lease term, provided that:

(a) any option to renew will be subject to mutual written agreement of the treated wastewater rate to be charged ASSOCIATES by the CITY for the option period;

(b) each option to renew shall be for a term of five (5) years; and,

(c) provided that neither ASSOCIATES nor the CITY is in default on this AGREEMENT.

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ARTICLE III

CONSIDERATION

3-1 Purchase of treated wastewater by ASSOCIATES from the CITY shall be based on the fair market value, as mutually agreed upon by ASSOCIATES and the CITY, for the volume and quality of the treated wastewater discharged by the CITY.

3-2 The fair market value shall be determined by mutual agreement prior to January 1, 1998, or the initial date of discharge by the CITY, whichever occurs at the later date, and shall be redetermined after each five (5) year period of this AGREEMENT.

3-3 ASSOCIATES shall pay, in advance, on January 1 of each calendar year, the annual cost to purchase, under the terms of this agreement, the treated wastewater. The volume of treated wastewater to be purchased by ASSOCIATES shall be estimated for each calendar year, based on independent engineers' estimates, such engineers' estimates to be mutually agreed to by ASSOCIATES and the CITY. Adjusted payments or credits shall be paid within thirty (30) days written notice by the CITY based on independent engineers' confirmed actual volume for the prior lease year. ASSOCIATES shall bear the cost of obtaining the independent engineers' estimates

3-4 ASSOCIATES shall receive a credit, to be applied pro-ratably over the initial term of this AGREEMENT in the amount of funds paid by ASSOCIATES for construction of advanced wastewater treatment facilities, provided however, that the actual ASSOCIATES annual cash payments for treated wastewater are equal to or greater than the CITY'S annual budget for operation and maintenance of the advanced treatment facilities. Such budget shall be determined by independent engineers and mutually agreed upon by ASSOCIATES and the CITY.

3-5 In the event that the annual purchase amount is not paid within thirty (30) days of the due date, ASSOCIATES shall pay a late fee equal to Ten Dollars ($10.00) per day.

3-6 It is anticipated that the CITY shall construct its wastewater treatment facility with funds provided by a BOND. The CITY shall use annual funds paid by ASSOCIATES for treated wastewater as a source of revenue for payment of the BOND. Furthermore, ASSOCIATES acknowledges and consents to the assignment of annual purchase payments for that purpose and agrees that, in case of a default by the CITY, under the

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terms and conditions of the BOND, ASSOCIATES shall make annual purchase payments to the Bondholder

ARTICLE IV

POINT OF DISCHARGE

4-1 "Point of discharge" shall be defined as the point at which the treated effluent leaves City property and enters property owned by Associates.

4-2 The CITY shall provide treated wastewater, under the terms and conditions specified in this AGREEMENT at a mutually agreed upon point of discharge. Such point of discharge shall establish the point at which ownership of the treated wastewater is transferred from the CITY to ASSOCIATES.

4-3 The CITY shall be responsible for all installation operating costs, including maintenance and repairs, for all facilities located within property owned by the CITY, up to the point of discharge.

4-4 ASSOCIATES shall be responsible for all installation and operating costs, including maintenance and repairs, for all facilities located within property not owned by the CITY, up to the point of discharge.

ARTICLE V

ENTRY AND INSPECTION

5-1 The CITY shall have the right of entry, during normal business hours, to inspect, upon ASSOCIATES property, the storage and use of treated wastewater purchased by ASSOCIATES from the CITY to insure compliance with all federal and state water regulations.

5-2 ASSOCIATES shall have the right of entry, during normal business hours, to inspect, upon the CITY property, the treatment and discharge of waste produced by the CITY'S wastewater treatment facility and related storage and discharge of the wastewater to insure compliance with all federal and state water regulations.

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ARTICLE VI

ASSIGNMENT AND SUBLETTING

6-1 ASSOCIATES shall not assign their interest or obligations in this AGREEMENT, nor any part thereof without the prior written consent of the CITY.

6-2 Consent to assignment shall not be unreasonably withheld by the CITY.

ARTICLE VII

DEFAULT

7-1 A breach of any of the provisions of this AGREEMENT shall be a breach of the entire AGREEMENT, and the breaching party shall be in default of the AGREEMENT. The non-defauting party shall provide the defaulting party ten days to cure any default. If the default is not cured within ten days, the non-defaulting party may cure the default and bill the defaulting party for the cost of the curing the default.

ARTICLE VIII

INDEMNITY AND INSURANCE

8-1 The CITY shall indemnify and hold harmless ASSOCIATES for damages or claims resulting from discharge from the wastewater treatment plant of wastewater effluent not in compliance with federal or state regulations.

8-2 ASSOCIATES shall indemnify and hold harmless the CITY for damages or claims resulting from its distribution, after receiving the notice required in Article 1-3 of this AGREEMENT, of wastewater effluent not in compliance with federal or state regulations.

8-3 ASSOCIATES shall provide any and all insurance for its employees as required by federal and Utah law.

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8-4 Prior to beginning construction, ASSOCIATES shall provide evidence of having obtained a surety or other bond sufficient to cover the cost of completing construction on its 18-hole golf course and containment ponds, as approved by the Tooele City Engineering Department and Planning Commission.

ARTICLE IX

DISPUTE RESOLUTION

9-1 Any disputes arising from this AGREEMENT shall be taken before a mutually agreed upon mediator. The recommendations of the mediator shall not be binding, but the parties shall make a good faith effort to adhere to said recommendations. Should a party reject the recommendations of the mediator, either party may proceed as permitted by law.

9-2 Each party shall bear its own costs and attorneys fees in any mediation proceedings Should mediation be rejected by a party, both parties may seek those remedies permitted by law.

ARTICLE X

FUNDING OBLIGATIONS

11-1 ASSOCIATES shall purchase from the CITY all of up to 2.25 million gallons per day of treated wastewater effluent discharged from the new wastewater treatment plant to be built by the CITY.

11-2 The purchased wastewater effluent shall be used upon a public golf course and in storage ponds constructed as part of the golf course. ASSOCIATES shall bear the entire cost of constructing the golf course and effluent storage ponds as part of the cost of its development. Effluent received in excess of golf course and storage pond capacity may be used by ASSOCIATES for other purposes not in violation of any Federal or State laws or regulations. ASSOCIATES shall bear the costs of implementing this use.

11-3 ASSOCIATES shall construct a water main line according to specifications provided by the CITY, such line connecting existing CITY water service to the new wastewater treatment plant. The CITY shall reimburse ASSOCIATES for one-half of the cost of construction at a rate to be mutually agreed upon in writing.

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11-4 The CITY shall bear the cost of designing and constructing the wastewater treatment plant, with the exception of the costs of the design and construction of advanced wastewater treatment facilities, which cost shall be born by ASSOCIATES. The advanced wastewater treatment facilities are those which make the plant effluent suitable for irrigation. The CITY shall bear the cost of designing and constructing all other fixtures and facilities associated with the wastewater treatment plant and located on property owned by the CITY. ASSOCIATES shall bear the cost of designing and constructing all fixtures and facilities associated with the wastewater treatment plant effluent and located on property not owned by the CITY.

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TOOELE ASSOCIATES

By: DREW HALL

ATTEST:

PATRICK DUNLAVY, City Recorder

TOOELE CITY CORPORATION

By: GRANT L. PENDLETON, Mayor

TOOELE CITY SEAL TOOELE COUNTY, UTAH

ACKNOWLEDGMENTS

STATE OF UTAH)
:ss.
COUNTY OF TOOELE)

The foregoing instrument was acknowledged before me this 18th day of June, 1996 by Mayor Grant L Pendleton and Patrick Dunlavy, Tooele City Recorder

SUE L CASIAS
Notary Public
STATE OF UTAH
My Comm. Expires AUG 27, 1998
90 NO MAIN TOOELE UT 84074

NOTARY PUBLIC

STATE OF UTAH)
:ss.
COUNTY OF TOOELE)

The foregoing instrument was acknowledged before me this 11th day of June, 1996 by Drew Hall for Tooele Associates.

SUE L CASIAS
Notary Public
STATE OF UTAH
My Comm. Expires AUG 27, 1998
90 NO MAIN TOOELE UT 84074

NOTARY PUBLIC

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Tab 2

OVERLAKE DEVELOPMENT AGREEMENT
EXHIBIT M
ANNEXATION AGREEMENT

ANNEXATION AGREEMENT

This Agreement is made this 15th day of November, 1995, by and between Tooele City Corporation, a municipal corporation of the State of Utah, hereinafter called "the City," and Tooele Associates, a partnership, hereinafter called "Petitioner," whose address is 2105 112th Avenue, N.E., Suite 100, Bellevue, Washington 98004. In consideration of the mutual agreements as stated below, the sufficiency of which is acknowledged by both parties, the City and Petitioner agree to performing the following obligations·

The Petitioner shall:

1. deed to the City thirty (30) acres in the far northwest corner of Petitioner's property for the new City sewage treatment plant within thirty (30) days of annexation;

2. transfer to the City perfected water rights to draw 686 acre feet of water from wells located on Petitioner's property within thirty (30) days of annexation;

3 set aside for the City 584 acres for schools, a fire station, roadways, parks, and other public services, as described in the Overlake Community Site Data Summary (see Attachment 1)--this is in addition to the thirty (30) acres for the new treatment plant--to be deeded to the City at such time as the land is needed to develop the schools, fire station, roadways, parks. etc

4 grant to the City such easements as are necessary to construct and operate the new sewage treatment plant and all water and sewer lines leading to the plant,

5 purchase all of up to 2 25 million gallons per day of plant effluent, at a rate to be negotiated, for twenty (20) years, to be used on a golf course and holding ponds constructed by Petitioner at its expense, or disposed of in some other way acceptable to the City,

6 comply with the requirements of Tooele City Code Title 4 (building regulations) and Title 7 (zoning and subdivisions),

7 construct, maintain, and manage an 18-hole public golf course by January 1, 1998,

8 construct a main water line (the size and location to be negotiated) connecting existing City service to the new treatment plant, with each party bearing one-half of the cost, the schedule of payments to be negotiated

The City shall:

I commit to a favorable approach toward the Petition for Annexation of Petitioner, dated September 9, 1995, pursuing such efforts as are appropriate to a municipal corporation, including bringing Petitioner's petition to a formal vote of the City Council,

2 construct a new sewage treatment plant at the far northwest corner of Petitioner's property,

3 adopt a zoning scheme which will allow Petitioner to develop its land according to the Overlake Community Site Data Summary and as approved by the Tooele City Building Official

Execution of this Annexation Agreement by Tooele Associates is a necessary condition to Tooele City Council approval of the Tooele Associates Petition for Annexation

This Annexation Agreement shall be binding upon all successors and assigns of Petitioner

Petitioner agrees to hold the City harmless from all liability and claims for damages by reason of injury to person or property arising from the performance or nonperformance by Petitioner, its employees, agents, and subcontractors, of its obligations under this Agreement

ATTEST

TOOELE CITY CORPORATION

Patrick H Dunlavy, Recorder

Grant L. Pendleton, Mayor

ATTEST

PETITIONER

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ATTACHMENT 1

OVERLAKE COMMUNITY SITE DATA SUMMARY

LAND USE	ACREAGE*
Treatment Plant	30 0 acres
Ponds (in golf course & parks)	95 0 acres
Sub-total Treatment Pl	125 0 acres
Open Space	
Golf Course	
(18 holes w/o ponds)	277 5 acres
Regional Park @ UP tracks	80 0 acres
Parks w/ ponds	45 5 acres
Nieghborhood Parks	10 5 acres
Equestrian/trails (2 5 mi)	3 0 acres
Sub-total Open Space	413 5 acres
Educational	
High School	55 0 acres
Institute	6 0 acres
Middle School	21 0 acres
Elementary Schools (3)	30 0 acres
Sub-total Educational	112 0 acres
Institutional	
Fire (one site @ south entry)	2 5 acres
Other (churches, fire, library, street maint civic, etc	10 0 acres
Sub total Institutional	22 5 acres
Housing	
2-acres + equestrian	565 0 acres
1-2 acre estates	262 0 acres
1/2 - 1 acre	75 0 acres
1/3 acre +	950 0 acres
Less than 1/3 acre SFR	85 0 acres
Patio/Zero-lot line SFR	45 0 acres
MFR (townhome/apts)	50 0 acres
Sub-total Housing	2,032 0 acres
Public roads	
Major Arterials (41,550x107)	102 0 acres
Collectors (19,600x80)	36 0 acres
Local Streets (132,800x60)	185 0 acres
Sub-total Public Roads	323 0 acres

* Total acreage of Tooele Associates and associated properties is 2,941 acres

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